Phil Smidt & Son, Inc. *and* Hotel, Motel and Restaurant Employees and Bartenders International Union, Local No. 103, AFL-CIO. Case 13-CA-18480

March 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 19, 1980, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge, and to adopt his recommended Order.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Phil Smidt & Son, Inc., Whiting, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] We agree with the Administrative Law Judge's finding that deferral to the arbitrator's decision would be inappropriate because the unfair labor practice issue in this case was not presented to the arbitrator nor considered or decided by him.

The Administrative Law Judge also concluded that Respondent's discharge of Josephine Faught violated Sec. 8(a)(1) inasmuch as Respondent relied on Faught's protected activities as a basis for her discharge. In evaluating the defense advanced by Respondent, the Administrative Law Judge set forth a series of alternative holdings. First, he determined that the purported lawful reasons advanced by Respondent for the discharge were pretextual. Next he held that, even if such alleged misconduct occurred, Faught's protected activities were at least an "in part" cause for her discharge. Finally, he held that even if the alleged misconduct occurred, it was of such a minimal nature that it would not have caused Faught's discharge "but for" her protected activities. Subsequent to the Administrative Law Judge's Decision, the Board issued *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). To the extent that the Administrtive Law Judge's Decision may be construed to apply an "in part" test, which is inconsistent with *Wright Line*, we do not adopt it. However, the Administrative Law Judge also found, in essence, that Respondent would not have discharged Faught in the absence of her protected activities. Thus, the Administrative Law Judge's analysis comports with the *Wright Line* mode of analysis. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Accordingly, we agree that Faught was discharged in violation of Sec. 8(a)(1).

Member Jenkins would not rely on *Wright Line* since the asserted lawful reasons for the discharge here have been found to be pretextual and thus there is only one genuine reason for the discharge, the unlawful one, and the *Wright Line* analysis serves no purpose in such cases.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In adopting the the Administrative Law Judge's conclusion that the discharge of Faught was unlawful under Sec. 8(a)(1), we find it unnecessary to rely upon the Administrative Law Judge's finding that Respondent's animus was indicated by Assistant Manager Mirza Baig's refusal to discuss his alleged problems with Faught in the presence of a union steward.

[4] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard before me on April 23, 1980, in Chicago, Illinois. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging employee Josephine Faught for engaging in protected concerted activity. Respondent denied the essential allegations in the complaint. The parties submitted briefs.[1]

Based on the testimony and the demeanor of the witnesses and the entire record in this case, including the transcript, exhibits, and decision in the related arbitration case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Phil Smidt & Son, Inc. (herein called Respondent), an Indiana corporation, maintains a place of business at 1205 North Calumet Avenue, Whiting, Indiana, where it is engaged in operating a retail restaurant. In the past calendar year, Respondent did a gross volume of business in excess of $50,000 and purchased and received goods and supplies valued over $50,000 from points outside the State of Indiana and purchased goods and materials valued over $50,000 from suppliers located within Indiana whose origin was directly from outside of Indiana. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] In addition to the record made before me, the parties submitted, as evidence, a copy of the transcript and exhibits before an arbitrator who considered whether the Faught discharge was proper under the applicable collective-bargaining agreement. The parties also submitted the arbitrator's decision.

II. THE LABOR ORGANIZATION

Hotel, Motel and Restaurant Employees and Bartenders International Union, Local No. 103, AFL-CIO, the Charging Party (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent's employees are represented by the Union. The union steward, Joe Bob Moore, is a waitress at Respondent's restaurant. There had been longstanding dissatisfaction among some of the waitresses over customer seating. There was a feeling among some waitresses that the hostesses were assigning customers unfairly, so that certain waitresses were given more customers or more affluent customers, while others were given fewer or less affluent customers such as elderly people and families. The waitresses objected to such "favoritism" because they believed that it resulted in different earnings in "tips."

Management was aware of their dissension. Mike Probst, Respondent's manager, testified that he knew that there was a concern on the part of the waitresses over customer seating. He testified, "[T]he Union Steward, Joe Bob Moore, had brought several girls to my attention during a time span prior to [February 23] and everytime she brought some to my attention, I would check into it." The complaints were made periodically, and, according to Probst, they came primarily from three to five waitresses.

Probst identified only one of the complaining waitresses by name, Josephine Faught, who had been employed by Respondent for 16-1/2 years before she was discharged in February 1979. Probst testified that "[i]n regards to Jo Faught where situations were brought up where she was seated unfairly in comparison with other girls, I've done several studies in regard to that." In December 1977, Faught filed a formal grievance, charging that "customers are handpicked for certain girls." Faught was the only waitress to file a formal grievance on this matter. The grievance was resolved by an agreement to "iron out the differences." Management conducted a study of customer seating assignments from August 29 to September 15, 1978, to determine whether hostesses were assigning customers unfairly, and found that they were not. The study was made available to waitresses, but only Faught went into the office and actually looked at the results. Moore testified that she doubted the truthfulness of the study, and, although approximately 28 waitresses were employed by Respondent, the study only covered 4 or 5 waitresses. Moore had been keeping track of customer seating on her own, and had advised other waitresses who had complained to her to do likewise. The dissatisfaction apparently continued after management's study was completed, for in November 1978, Moore and another waitress, Julie Jakura, met with Assistant Manager Mirza Baig to discuss preferential treatment being given to certain waitresses. This was not the first time Moore had discussed the problem with Baig; the subject came up periodically, and Baig had promised to check on the problem and see that assignments were made fairly.

Faught was the most vocal complainer with regard to seating. Hostess Ann Olenik testified in the arbitration hearing that Faught complained about seating assignments more than anyone else. Faught had received two disciplinary notices; both were issued more than 1 year prior to her discharge and both involved incidents over customer seating. In December 1977, Faught received her first notice and a 1-day suspension for getting into an argument with a hostess over a complaint from Faught with regard to unfair seating. The incident allegedly took place during a busy part of the day in full view of customers. The second notice, dated February 16, 1978, also imposed a 1-day suspension on Faught for an argument she had with a hostess over the assignment of a certain customer to her station. Faught allegedly said she did not want to wait on a particular customer, who was a regular at the restaurant, and the customer overheard Faught's remarks. Apparently, Faught had had problems with this customer in the past and she was assured by management that she would not have to wait on him again. According to Faught, Probst agreed that the customer was a difficult person but he said he had to suspend her.

On the morning of February 23, 1979, Faught learned that she had been assigned to a station with booths for the third day in a row. Because of a back ailment, bending over booths caused Faught considerable pain in her legs. Upset over the assignment, Faught called Moore to complain, and raised the issue of unfair seating. Moore told Faught to keep track of the customer count in order to gather evidence upon which Faught could file a grievance.

Faught began keeping track of customer seating around 11:15 a.m. She testified that, in order to record customer seating, she needed only to look into the dining rooms on either side of her station, and place hash marks on a small piece of paper. She did so until 12:15, p.m. at which time she stopped because she became too busy with customers. The entire process took a minute or two.

The hostess, Ann Olenik, informed Baig and Probst that Faught was keeping track of customer assignments. Olenik noticed that Faught was writing on a piece of paper every time Olenik seated customers and assigned tables. Baig testified that this was his first knowledge that Faught "was causing trouble." Probst also testified that this was his first knowledge of Faught's activities on February 23. Baig himself observed Faught writing on a piece of paper but said nothing to her during her shift. Probst also saw Faught writing on a piece of paper. He assumed she was keeping count of customers, but said nothing to her at the time. Probst testified that it only took her a few seconds to record the customer count. He also testified that, although he objected to this activity because it was not part of Faught's duties and he believed it could prevent her from taking care of customers generally, he did not notice that it interfered with her service to customers. Probst testified that there was no

rule against keeping track of customer seating provided it did not interfere with customer service.

Later, during the lunch hour, at or about 1 or 1:30 p.m., Faught was told by the hostess that two tables were being cleaned and put together for a party of five. One of the tables was assigned to the station of Alice Marshall, another waitress, and the other table was deemed "dead"; i.e., assignable to any waitress. It was a fairly busy day, and Faught had a large number of customers. Faught testified that she did not understand that the table had been assigned to her, because tables were not normally reassigned in the middle of a shift. According to Baig, he noticed that the customers at the table had not been waited on, and told Faught to serve the table. Faught testified credibly as follows:

> Mirza said, "Have you been over to that party of five yet?" I said, "what do you mean?" He said, "That party of five, Ann told you to take those people." I said, "No, she didn't, but if you want me to I will," and I went right to the table.

She noticed that Baig looked angry. Later, when she asked Marshall why she had been assigned the table, Marshall told her to ask the hostess.

About 2:30 p.m., Baig approached Faught and asked her to report to the office to speak with him when she finished waiting on her customers. Faught then called Moore and asked her to come to the restaurant because she thought she was in trouble. Moore agreed to come. Shortly thereafter, Baig asked if Faught were ready to come to his office. She told him that she still had customers, and that Moore would arrive soon. Faught stated that Baig then shook his finger at her, saying, "What do you mean Joe Bob, I want to talk to you." When Moore arrived, Baig told them he had no time to talk, and that Probst would talk to them when he arrived at 4:30 p.m. He added that he wanted to talk to Faught and that when Moore sat in on conversations "everything always gets all mixed up." Faught's quitting time was 4 p.m. and she had to leave because she had obligations at home and could not stay. She mentioned this to Baig. Moore agreed that Faught should go home and also agreed to tell Probst that she would meet with him at some other time.

Later that afternoon, Probst called Faught at home and told her that she was "on three days suspension pending termination for insubordination." Probst did not explain what he meant by insubordination, did not give any further details, and did not ask for an explanation from Faught. Faught asked if Moore knew about the call and Probst asked why she had to know. After hanging up, Faught called Moore at the restaurant and informed her of Probst's call.[2]

On March 1, 1979, Probst informed Faught that she was being terminated. In a letter to Union Steward Moore, which carries the date of March 2, Probst stated the following as the reasons for Faught's discharge:

> 1. Failure to serve a table that the hostess had instructed her to.
>
> 2. Throwing silverware in the silverware containers in the dining room causing noise.
>
> 3. Dirty dishes and glasses left on tables after customers had paid the bills.
>
> 4. Keeping track of customer seating, preventing her from providing proper service.
>
> 5. Going thru other waitresses duplicate checks to see how many people she had.
>
> [Faught's] termination was based upon the above incidents plus two previous disciplinary warnings she has received.

Probst had personal knowledge of Faught's keeping track of customer seating because he saw her doing so. He only learned of the other reasons by talking to Baig and Hostess Ann Olenik.

On February 23, the day of the incident and suspension, Baig spoke to Faught only about the alleged failure to wait on a table—a charge which was admittedly incorrect. He did not speak to her about any of the other charges later made against her.

A grievance was filed on Faught's behalf contesting the suspension and discharge. Union and management representatives, as well as Faught, met concerning the grievance on at least two occasions. The grievance was not resolved to the satisfaction of all the parties and the case was submitted to arbitration under the applicable collective-bargaining agreement.

A hearing was held before an arbitrator on July 31, 1979. The arbitrator issued his decision and award on December 21, 1979.

The arbitrator considered whether the five alleged reasons for the discharge together with the fact that Faught had been issued two previous disciplinary warnings provided sufficient justification for the discharge under the contractual language permitting discharges only for "just cause." The arbitrator found that Respondent failed to prove four of the five charges. He stated that the first charge, which he said was the "basic charge" leveled against Faught—"insubordination for failure to serve a table"—was admittedly unsupported. The evidence simply showed a delay of from 5 to 10 minutes in serving the table.

The arbitrator found no support for the fourth charge—that Faught's keeping track of customer seating interfered with customer seating. This activity did not occur within the 5- or 10-minute delay recited above and there was no other evidence of interference with service. The arbitrator also found lack of support for the third and fifth charges—going through other waitresses' duplicate checks and leaving dirty dishes and glasses on tables after customers had paid the bills. He did find, resolving contradictory evidence between Faught and Baig, that Faught had noisily thrown silverware into bins. He also found no contractual support or union acquiescence in a policy that an employee who had three disciplinary no-

[2] The above is based on the credited testimony of Faught. I do not credit Probst's testimony that he mentioned five specific reasons for his action to Faught on the telephone. His testimony is disputed by a written notice signed by him and dated "2/23/79," which corroborates Faught's testimony. In addition, Probst was unsure of himself when testifying about whether he mentioned the five reasons over the telephone.

tices should be discharged. He distinguished evidence submitted by Respondent concerning the records of two other employees who had been discharged after three disciplinary incidents because the incidents had occurred, in one case, within a 1-month period, and, in the other, within a 5-month period, and because their records were poorer and their offenses more serious than Faught's. The arbitrator also noted that a provision in the applicable contract barred peremptory discharges and stated that Respondent's decision, which was taken without speaking with Faught or giving her an opportunity to explain, violated the spirit of that provision. Thus, the arbitrator found that Faught's proven derelictions on February 23—delaying 5 or 10 minutes before waiting on a table and throwing silverware noisily into a bin—were of insufficient severity for discharge, but warranted a suspension for 90 days.

The arbitrator awarded reinstatement and backpay for all but 90 days of Faught's loss of employment. Faught was reinstated but there apparently has been no agreement on the backpay owed under the award and none has been paid. The parties have made no effort to resolve the backpay issue either by a resubmission to the arbitrator or by enforcement of his award. Settlement discussions in this case revealed that the parties were close to agreement on a dollar figure for backpay, but they insisted on litigation when neither side could convince the other to accept its backpay figure.

Prior to her difficulties documented above, Faught had been a good and valued employee. The record contains two letters of commendation from longtime customers of Respondent's restaurant.

B. *Discussion and Analysis*

1. The *Spielberg* deferral issue

The threshold issue here is whether the Board should defer to the decision of the arbitrator in this matter. The Board's policy is that it will defer to an arbitration award where the proceedings were fair and regular, all parties have agreed to be bound by the award, and the decision is not repugnant to the purposes and policies of the Act.[3] The Board also requires that the parties present the unfair labor practice issue to the arbitrator and that he consider and decide the issue. The burden of proof is on the party seeking Board deferral to prove that the unfair labor practice issue has been litigated before the arbitrator. *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980).

In the instant case, the unfair labor practice issue was not presented to or considered and decided by the arbitrator. The issue in this case is whether Josephine Faught was discharged for engaging in a protected concerted activity; i.e., keeping track of customer seating in support of a longstanding dispute between employees and management. Although two of the reasons given by Respondent for Faught's discharge involve keeping track of customer seating, the arbitrator found that the evidence on both points did not support the discharge. He found, for example, that Faught's activity did not interfere with her work and there was no rule against keeping track of customer seating or going through duplicate checks where no interference with customer service was involved. However, the arbitrator did not consider whether Faught's activity in this respect was concerted or whether it was protected under the National Labor Relations Act. Nor did he consider whether, in view of the other reasons given for the discharge, the alleged prohibited reasons were the real reasons for the discharge either in conjunction with other valid reasons or as the dominant motive for the discharge. The arbitrator did not determine whether any of the proffered reasons were pretexts for Respondent's personnel action. He merely decided whether the reasons given by Respondent were supported by the evidence and whether the reasons provided "just cause" for Respondent's conduct under the applicable contractual language. He found that one reason given by Respondent was supported by the evidence and that the evidence concerning another, while not supporting the charge, did show a dereliction on the part of Faught. Having found the alleged unlawful reasons were unsupported by the evidence, the arbitrator did not go further—indeed he was not requested or authorized to—and find whether those reasons were nevertheless the real reasons for the discharge despite his finding that some of the other valid reasons offered by Respondent may have had evidentiary support. Nor did he address the issue of whether the valid reasons which had no evidentiary support were pretexts. Indeed, the fact that, as the arbitrator found, some of these other reasons to have been insufficient to justify a discharge leaves open the question of why an allegedly unlawful reason, without evidentiary support, was utilized as grounds for the discharge of Faught. These questions are decided almost daily by the Labor Board. In short, the arbitrator's analysis in this case—whether reasons offered by Respondent provided "just cause" for its action—does not neatly fit into the analysis the Board must make in deciding whether a discharge, admittedly made for an allegedly unlawful reason, violates the Act. Thus, the arbitrator was not presented with, nor did he consider or decide, the unfair labor practice issue in this case.

Indeed, I would go further and find that, if the arbitrator's decision were to be read as justifying a 90-day suspension for conduct which included an unlawful reason under the Act, it would be repugnant to the policies of the Act. Two of the reasons offered by Respondent for its conduct involved, as I find *infra*, protected concerted activity. It is settled law that where the real reason for employer's conduct is unlawful, the mere existence of valid reasons is no defense to a charge of unlawful discipline or discharge.[4] Thus, to the extent that the arbitrator's decision can be read to have sanctioned punishment on the mere existence of valid reasons for the employer's personnel action—without a further analysis of the real reason for the employer's action or whether the reasons offered were pretexts—it is repugnant to the policies of

[3] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

[4] See *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] v. *N.L.R.B.*, 365 U.S. 667, 675 (1961); *N.L.R.B.* v. *Symons Manufacturing Co.*, 328 F.2d 835, 837 (7th Cir. 1964); *Waterbury Community Antenna, Inc.* v. *N.L.R.B.*, 587 F.2d 90, 97–98 (2d Cir. 1978).

the Act. Moreover, to the extent that the arbitrator's decision can be read to sanction punishment where one of several reasons for the Employer's action is an unlawful one, it is contrary to the Board's view that discipline which is based even in part on unlawful reasons is unlawful.[5] Nor does the arbitrator's analysis comport with the "but for" or dominant motive standard espoused by some courts.[6]

2. The suspension and discharge

The General Counsel alleges that Faught was discharged for engaging in protected concerted activity, keeping track of customer seating in support of longstanding employee complaints and a possible grievance. Respondent alleges she was not engaged in protected concerted activity, and, in the alternative, that she was not discharged for such reason. I reject both contentions.

a. *Faught was engaged in protected concerted activity of which Respondent had knowledge*

The evidence demonstrates that Faught was engaged in protected concerted activity on the last day of her employment. She was the most prominent protestor against unfair customer seating. This was an issue clearly involving the working conditions of Respondent's waitresses and it was a group concern. Faught undertook to keep track of customer seating on behalf of several waitresses who had protested the allocation and seating of customers by hostesses. Since at least late 1977, Respondent's waitresses had discussed the issue of unfair seating assignments. Union Steward Moore, Faught, and several other waitresses, including Julie Jakura, had made repeated complaints to Respondent about favoritism in customer seating. Moore had instructed several waitresses to keep track of customer seating in support of the effort of the waitresses to seek redress. Faught was the most prominent protestor in this group effort. She had often complained about the practice, had previously filed a formal grievance challenging it, and twice previously had been disciplined over incidents arising from protests over customer seating. On February 23, Faught's union steward had suggested and requested that she commence formally keeping track of customer seating assignments because, as she stated, "we've got to have some evidence for you to file grievance." Faught's tracking of customer seating was clearly beneficial to all the waitresses who had complained of or suffered from favoritism in seating assignments. Indeed, Probst explicitly conceded that Faught's activity was concerted when he agreed that Faught was "stirring up other waitresses" because, in his words, "they felt that she was keeping an eye on them and what they were doing and how many people they got." Accordingly, Faught was clearly engaged in protected concerted activity.

It is also clear that Respondent knew that Faught's activities of February 23 were of a concerted nature. Both Probst and Baig testified that they saw Faught keeping track of customer seating. They knew what she was doing and they knew of the longstanding problems waitresses had had with customer seating. They also knew—Probst certainly did—that Faught was a prominent protestor had filed at least one grievance on the matter which had spawned a management study which she had been shown. She had twice been disciplined for incidents arising out of customer seating complaints. Moreover, Probst's testimony, noted above, demonstrates that he recognized that Faught was "stirring up" the other waitresses. In addition, Baig admitted that he believed that Faught and another waitress, Julie Jakura, were together later in the day on February 23 when Faught was going through her duplicate checks. Respondent stated as another ground for its disciplinary action that Faught was doing this "to see how many people she had." On its face this charge shows that Respondent believed that Faught's customer seating protest involved at least one other person. Baig knew that Jakura was another prominent protestor against unfair customer seating. It is clear therefore that Respondent knew of the concerted nature of Faught's activities on February 23, 1979.

Respondent's contention that Faught's activities were unprotected because they were undertaken during working hours is without merit. Respondent had no rule against keeping track of customer seating or counting other employees' checks. There is absolutely no evidence that her activities interfered with customer service. Neither Baig nor Probst talked to Faught when they saw her engage in this conduct and both agreed that the activity was brief. Faught's testimony was that the activity took her a total of 1 or 2 minutes and that she quit when she got busy. I therefore agree with the arbitrator that this activity did not interfere with customer service. In these circumstances, Faught's activities, even though conducted during working hours, were protected.

b. *Respondent's real reason for discharging Faught was that she was engaged in protected concerted activity*

Respondent offered seven reasons for Faught's discharge—the original charge of "insubordination," the five reasons listed in the letter written March 2, plus the conclusory reason that she has two previous disciplinary warnings, a fact which was mentioned in the March 2 letter. Two of the listed reasons—keeping track of customer seating and going through other waitresses' duplicate checks "to see how many people she had"—dealt with protected concerted activity. The evidence demonstrates that the other asserted reasons for Faught's discharge were pretextual and that the real reason was her involvement in protected concerted activity.

Respondent cited two aspects of Faught's checking on customer seating assignments as reasons for discharge: her keeping track of customer seating and her counting of other waitresses' duplicate checks. Both of these activities constituted protected concerted activity, as explained above. Respondent, thus, concedes that its dis-

[5] *Vic Tanny International, Inc.*, 232 NLRB 353, 354 (1977), enfd. 622 F.2d 237 (6th Cir. 1980); *International Medication Systems, Ltd.*, 247 NLRB 1351 (1980); *Charles Edwin Laffey d/b/a Consolidated Services*, 223 NLRB 845, 845-846 (1976). See also *N.L.R.B.* v. *Townhouse T.V. & Appliances, Inc.*, 531 F.2d 826 828 (7th Cir. 1976); *Chicago Magnesium Castings Co.* v. *N.L.R.B.*, 612 F.2d 1028 (7th Cir. 1980).

[6] See *N.L.R.B.* v. *Wilson Freight Company*, 604 F.2d 712, 722 (1st Cir. 1979), and *Waterbury Community Antenna, Inc.* v. *N.L.R.B.*, *supra.*

charge of Faught was based on her activity in protest of customer seating policies. Indeed, both Baig and Probst testified that their first knowledge of objectionable conduct on Faught's part on her last day of employment was a report from the hostess to them that she was keeping track of customer seating. Thus, the causal connection between Faught's protected concerted activity and her termination is clear.

Respondent admittedly had no rule against keeping track of customer seating so long as it did not affect customer service and, in Faught's case, there was no evidence that it did. Neither the manager nor the assistant manager could point to any evidence of failure of service because of her activity and they did not mention it to her at the time. Thus, there was, as the arbitrator's decision points out, no reason to make this charge against Faught. The only objection Respondent had was that Faught engaged in the activity which has been found to be protected concerted activity. Moreover, there is no merit to the claim that Faught was actually going through the checks of other waitresses, a finding which the arbitrator also made. Baig, who personally reported this alleged infraction, admitted that going through duplicate checks was another way of keeping track of customer seating. However, he was not even sure whose checks Faught was going through. He assumed they were Julie Jakura's because she was standing next to Faught at the time. Actually, Faught testified she was going through her own checks. Baig never even approached Faught at the time to tell her why or how this was improper. In fact, Baig admitted there is no rule against a waitress going through her checks. Since Baig also admitted he did not know whose checks Faught was going through and that there was no interruption in customer service, here again the only objection to Faught's activity was that she was checking on how many customers she had that day, another aspect of keeping track of customer seating, a protected concerted activity.

The record shows that Respondent displayed animus toward Faught for her participation in customer seating protests. She was twice disciplined for conduct arising out of customer seating disputes. More importantly, however, there is evidence, based on the testimony of Moore which I credit, that both Baig and Probst had threatened disciplinary action against employees who kept track of customer seating. Baig did not contradict this testimony and, although Probst did, in part, I credit Moore who was a more candid and impressive witness. Probst himself admitted, in the arbitration hearing, that he may have threatened such action if the employee's conduct interfered with customer service. However, it is clear from this record that Respondent was more concerned with the employee investigation of customer seating abuses than work interference, for, in Faught's case, there was no evidence of interference with work or customer service and Respondent made no effort to even investigate that fact. Furthermore, I found Probst to be a vacillating witness. This was exemplified by his inconsistent answers to questions by the General Counsel as to whether any one of Respondent's stated reasons would have supported the discharge. At one point he said that the existence of all of the reasons were necessary for the discharge; at another, he said that the existence of any one would have resulted in discharge. In addition, Probst's testimony on whether he told Faught the specific reasons for the discharge was not reliable. (See fn. 2, *supra*.) In these circumstances, I credit Moore and find that, at various times, both Probst and Baig threatened that they would discipline or discharge employees if they kept track of customer seating, the very activity which prompted Faught's discharge.

In addition, Respondent's animus is illustrated by evidence that Baig refused to discuss his alleged problems with Faught in the presence of a union steward. While not alleged or found as a specific violation, such conduct shows that Baig was angry at Faught and that anger was based on her expressed intent to bring her union representative into a conference with possible disciplinary consequences. Since it is settled law that asking for her union representative in these circumstances was a protected concerted activity, see *N.L.R.B.* v. *Weingarten, Inc.*, 420 U.S. 251 (1975), Baig's anger directed to this activity is probative of his motive in effectuating the discharge for a related protected activity. Baig was well aware that Moore, the union steward, had been instrumental, as had Faught, in voicing customer seating complaints.

Faught's discharge occurred precipitously, ending the employment of a 16-year veteran waitress who had a good employment record, but who had been in the vanguard of continuing employee efforts to root out unfair customer seating practices. Faught was suspended at the end of the day in which she was observed engaging in conduct which Respondent regarded objectionable but which was in fact protected and concerted. She was suspended and fired without being permitted to give her side of the story, in contravention of a contractual requirement against peremptory discharges. The reason given to her originally—insubordination—was augmented, after the suspension, by numerous other reasons, some of which had to do with her protected concerted activity, most of which were pretextual, and none of which, in reality, supported the original charge of insubordination.

Respondent originally stated that its reason for terminating Faught was insubordination. Yet Baig admitted that Faught had not refused any order he had given on February 23—and, as far as he knew, she had not talked back to him or any other management official. Later, Respondent gave six more reasons for the discharge. The only stated reason which could arguably be labeled insubordination was the charge—which Respondent later admitted was false—that she failed to serve a table that the hostess had instructed her to serve. The evidence revealed that Faught had simply delayed 5 to 10 minutes before she served the table. Thus, the basic original underpinning of the discharge was exposed as false.

Respondent modified its original charge of failure to serve a table and claimed that a reason for the discharge was a delay in serving a table. The arbitrator found this latter claim was supported by the evidence; I find, however, that this reason was a pretext for Faught's discharge. First of all, had Respondent truly been con-

cerned about a lapse in customer service, it would not have falsely accused Faught of failure to serve a table when a simple investigation would have shown that she simply delayed 5 to 10 minutes in serving the table. Indeed, the delay was not given as a reason for the suspension. Although, at the hearings, Respondent's officials tended to exaggerate the significance—after-the-fact—of this alleged offense on the ground that a 2- or 3-minute delay was all they could tolerate, the record refutes the charge. Probst stated that, several times in the past 3 years, customers had walked out because of delays of 5 to 10 minutes, but that no waitress had been suspended in the past for failing to serve a customer within 5 to 10 minutes. Moreover, contrary to the arbitrator, I accept Faught's testimony that she did not understand immediately her table assignment from the hostess. It was admittedly a busy lunch hour and the table was not normally at her station. In short, the asserted reason—failure to serve a table—was not supported by the evidence and was not even investigated before Faught was discharged. Respondent can hardly rely on evidence of a delay which was only revealed after the discharge decision in order to support a discharge based on a different and false reason. Accordingly, I find that both the asserted reason—failure to serve a table—and the modified reason—delay in serving a table—were pretexts to mask a discriminatory reason for the personnel action.

A third reason given for the discharge—leaving dirty dishes and glasses on tables after customers paid the bills—was demonstrably unsupported and rejected by the arbitrator. Indeed, Baig's testimony on this point shows only that, at one point during the lunch hour, he saw dirty dishes on a table when the customer was presented his check. This was apparently objectionable because a waitress is supposed to clear the table before giving a customer his check. The charge is really preposterous. First of all, Baig's testimony on this point was vague. He admitted that he could not remember everything that was on the table. He does admit, however, that he told Faught to give the customer the check—the customer was apparently in a hurry and had asked for his check—and did not tell her to clear the table. Baig admittedly did not know what had transpired between Faught and the customer. Faught testified that when she was asked to present this particular customer his check, one man still had his plate of french fries left and there were drinking glasses left on the table. One customer asked her not to take the glasses. This testimony was uncontradicted. Not only did Respondent not investigate the matter to ascertain whether the customers had asked to keep their glasses and trays, but also Faught's uncontradicted testimony shows that dirty dishes are often left on tables when bills are presented, particularly when customers are in a hurry. The alleged infraction was not shown ever to have resulted in disciplinary action before, and, because the charge itself was, in this case, minor and not shown to have been the result of a dereliction of duty, it raises the question as to why it was offered as a reason for the discipline of Faught. I find that it was a pretext to mask the unlawful reason for Faught's discharge.

Respondent also maintained that Faught's discharge was mandated by the fact that she had received two prior disciplinary warnings. This assertion fails to withstand scrutiny. As the arbitrator pointed out, there was no such policy acquiesced in by the Union or required by the contract. The two instances offered by Respondent as proof that it enforces a policy of discharge on the third disciplinary action were distinguishable. In the first case, the employee received three disciplinary warnings in a 3-week period and the warnings were for constant consumer complaints about poor service and often being late to work. In the other case, the employee received three warnings in a 5-month period and the warnings were for constant consumer complaints culminating when three regular customers walked out after waiting 45 minutes to be served. Faught's situation is far different: she received three warnings over a period of 14 months—two of which were 1 year before the third one, no customer walked out on her, and no customers complained about her service. Faught was a 16-year veteran employee and she was not even given the opportunity to give her side of the story before being suspended. Such peremptory action by Respondent is strong evidence in support of an unlawful motive.

I also find as a pretext the reason specifically mentioned by Respondent and found by the arbitrator to be supported by the evidence; namely, that Faught noisily threw silverware in the metal storage bins. The arbitrator credited Baig over Faught on the ground that she was angry that day about her customer assignments. However, having observed and heard both witnesses, I credit Faught's testimony that she did not noisily throw silverware. Baig's testimony on this point is unclear. The first time he heard the noise of silverware striking the metal bin he was in another room. The second time he heard the noise he was at the cashier's desk with his back to where Faught was filling the silverware bin. Although he claimed at the hearing to have seen Faught throwing the silverware, Baig had told Moore at an earlier grievance meeting that he had not actually seen Faught's actions, but had heard the noise and turned around and seen her standing by the silverware bin. In contrast, Faught's testimony was clear and unambiguous. Faught specifically denied having thrown silverware into the bin. She simply replaced the silverware to reset her station. Faught had customers at her station at the time, and she carried on a conversation with those customers during the time when the alleged incident occurred. No customer complained of the noise. Faught's uncontroverted testimony is that the noise from replacing the silverware did not interfere with the conversation.

Baig's testimony is suspect not only because it was vague, but also because he was interested in establishing pretextual reasons for the discharge which turned out to be unsupported by the evidence and which he was unwilling even to investigate for accuracy. His animus toward Faught for keeping track of customer seating colored his entire testimony. I also deem significant his failure to mention his objection to the alleged silverware throwing incident to Faught either at the time it happened or at some other time during the day. There were

no customer complaints and the incident, even if it happened, would hardly call for the suspension or discharge of a veteran employee unless some other reason existed. That reason was plainly the unlawful reason; namely, that Faught was stirring up trouble by checking on customer seating.

In these circumstances, I find that the real reason for Respondent's suspension and discharge of Faught was her participation in protected concerted activity. The fact that Respondent gave two reasons to support its discharge of Faught which dealt with protected concerted activity of which it had knowledge and which were unsupported by any evidentiary basis for discipline is strong support for the finding. The other reasons were pretexts. They either did not exist or, if they did, were so insignificant that they would not have independently resulted in suspension or discharge, and I find that they were not real reasons for Respondent's conduct.

However, if, contrary to my findings, it could be determined, as the arbitrator found, that the silverware incident did occur and if it could further be determined that the silverware matter was not a pretext, it is clear that this reason existed side by side with the unlawful reasons of keeping track of customer seating. The other objectionable conduct—delaying 5 or 10 minutes waiting on a table—was admittedly not a reason given for Respondent's conduct. It was a reason revealed after the discharge. But even if this too could be viewed as a reason supported by the evidence which actually motivated the discipline and discharge, it also existed side by side with the unlawful reasons. In these circumstances, the discharge was partially caused by the protected concerted activity in which Faught had been engaged. And, as noted above, a discharge which is motivated, even in part, by the employee's participation in protected concerted activity that discharge violates Section 8(a)(1) of the Act. I would go further, however, and find, based on my analysis of all of the reasons offered by Respondent, that the protected concerted activity—keeping track of customer seating assignments in a continuing effort to protect working conditions of waitresses—was the primary reason for Faught's discharge. But for this protected concerted activity of Faught, which Respondent specifically invoked as two of its reasons for the discharge, Respondent would not have discharged Faught.[7]

CONCLUSIONS OF LAW

1. By suspending and discharging employee Josephine Faught for engaging in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

2. The said unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in the unfair labor practice set forth above, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to make Josephine Faught whole for any and all losses of wages and other compensation and benefits she may have suffered as a result of her unlawful suspension and discharge with such losses to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[8]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record and Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Phil Smidt & Son, Inc., Whiting, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, disciplining, or otherwise interfering with, restraining, or coercing employees in the exercise of their Section 7 rights under the National Labor Relations Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action:

(a) Make whole Josephine Faught for any loss of earnings or benefits she may have suffered in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, reports and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its Whiting, Indiana, facility copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[7] In view of my finding that Respondent discharged Faught for engaging in protected concerted activity, a violation of Sec. 8(a)(1) of the Act, I do not reach the further issue of whether the discharge also violated Sec. 8(a)(3) of the Act because it was motivated by union animus.

[8] Since Faught has been fully reinstated to her former job, I shall not order the usual reinstatement remedy.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT suspend, discharge, discipline, or otherwise interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse, with interest, Josephine Faught for any loss of earnings she may have suffered because of our unlawful suspension and discharge of her for engaging in protected concerted activity under the National Labor Relations Act.

PHIL SMIDT & SON, INC.